Supreme Court, U.S.
FILED
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No. ——

In The
Supreme Court of the United States

JACOB J. FAUST,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the exigent circumstances exception to the Fourth Amendment permits an officer to conduct a nonconsensual warrantless search and seizure of blood when a voluntary, valid chemical breath test over the legal limit has already been obtained.

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PETITION FOR A WRIT OF CERTIORARI

Attorney Kirk Bowden Obear, on behalf of the Petitioner Jacob J. Faust, petitions for a writ of certiorari to review the judgment of the Supreme Court of Wisconsin in this case.

OPINION BELOW

The opinion of the Supreme Court of Wisconsin is found at *State of Wisconsin v. Faust*, 2004 WI 99, 682 N.W.2d 371 (July 2, 2004). The opinion is reproduced at Appendix A.

JURISDICTION

The opinion of Supreme Court of Wisconsin, reversing the Court of Appeals decision below, was entered

on July 2, 2004. The Supreme Court of Wisconsin is the court of last resort in the State of Wisconsin. The question of whether the exigent circumstances exception to the Fourth Amendment permits an officer to conduct a nonconsensual warrantless search and seizure of blood when a voluntary, valid chemical breath test over the legal limit has already been obtained was presented to the Supreme Court of Wisconsin and decided on the merits. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provision involved is:

UNITED STATES CONSTITUTION, AMENDMENT IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The relevant statutory provisions are set forth in an appendix to the petition. Appendix C.

STATEMENT OF THE CASE

In the circuit court[1] for Sheboygan County, the petitioner filed a motion to suppress the result of the blood test taken without his consent, arguing that since a voluntary

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[1] The court of original jurisdiction in Wisconsin is the Circuit Court. There is a Circuit Court in each of the 72 counties within the state.

breath test had already established that his alcohol concentration exceeded the legal limit, there was no longer any exigency justifying a blood draw without a warrant, thus violating the Fourth Amendment to the United States Constitution, as well as article 1, section 11 of the Wisconsin Constitution[2]. The circuit court granted the petitioner's motion and the State appealed the decision to the Wisconsin Court of Appeals. That court affirmed the circuit court's ruling and the State again appealed to the Supreme Court of Wisconsin. A divided Supreme Court reversed the decision of the Court of Appeals, finding that the rapid dissipation of alcohol in the bloodstream of an individual arrested for a drunk driving related offense constitutes an exigency that justifies the warrantless nonconsensual test of that individual's blood, even if the police already have an valid breath test establishing the suspect's alcohol concentration over the legal limit. The case has not yet been tried in Sheboygan County Circuit Court as the parties were willing to proceed with the appellate process on this issue prior to resolution or trial of the case. The trial has been suspended pending the outcome of petitioner's appellate challenge.

1. The underlying facts

The facts below were undisputed. On February 19, 2002, Sheboygan police officer James Olsen conducted a traffic stop in the City of Sheboygan, Wisconsin. Prior to the stop, the officer had observed that the license plate displayed on the car petitioner was driving was registered to a different type of vehicle than that which was observed. When the officer pulled the vehicle over and identified the petitioner, he noted a strong odor of intoxicants coming from the

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[2] The Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution are virtually identical and both establish the right of persons to be free from unreasonable searches and seizures. *See, State v. Krajewski*, 2002 WI 97, ¶18, n9, 255 Wis. 2d 98, 648 N.W.2d 385 (2002).

vehicle and noted that Faust's speech was slurred. Officer Olsen also observed that Faust's eyes were bloodshot and glassy. Faust admitted to having consumed five brandies and the officer administered several field sobriety tests, which Faust apparently did not pass satisfactorily. Officer Olsen then administered a preliminary breath test which returned a result of .13 g/100 ml of blood alcohol content.

Officer Olsen then transported Faust to the Sheboygan police department, where he agreed to provide a sample of his breath for chemical analysis. The breath test revealed that Faust's alcohol concentration was .09 grams of alcohol per 210 liters of breath, which is over the legal limit in this case. Wisconsin law establishes the prohibited alcohol concentration of .08 grams of alcohol per 210 liters of breath in this case. WIS. STAT. § 885.235(1)(g)(cd) (2001-02) (Appendix C). Officer Olsen believed that the test was accurate and valid.

At this point in the process, Officer Olsen was aware that Faust had a prohibited alcohol concentration, since his breath test result was over the legal limit. In spite of this fact, the officer requested an additional test of Faust's blood, which Faust refused to consent to. The officer did not "need" this test, but simply "desired" it. *See, State v. Faust*, 2004 WI 99 at ¶65, (Prosser, J., dissenting). Appendix A, pg. 35a. The officer then proceeded to obtain a forced blood draw from Faust which yielded a blood alcohol concentration of .10 g/100 ml of blood.

2. The circuit court proceedings

On October 16, 2002, Faust filed a motion to suppress the blood test results, arguing that since the breath test had already established that he had a prohibited alcohol concentration, there was no longer any exigency that justified a nonconsensual warrantless blood draw. The

circuit court agreed with Faust, reasoning that exigent circumstances did not exist to justify the warrantless taking of Faust's blood. The State appealed this decision.

3. The Court of Appeals of Wisconsin decision

October 1, 2003, the Wisconsin Court of Appeals issued a published decision affirming the ruling of the circuit court. *State v. Faust*, 2003 WI App 243, 267 Wis. 2d 783, 672 N.W.2d 97 (Ct. App. 2003). Appendix B, pg 37a. The Court of Appeals found that once an individual arrested on probable cause for an alcohol related offense has provided a satisfactory and usable chemical test, the exigent circumstances justifying a warrantless and nonconsensual blood draw no longer exist.

The Court of Appeals relied upon a decision of the Wisconsin Supreme Court, *State v. Krajewski*, 2002 WI 97, 255 Wis.2d 98 (2002), *cert denied*, 537 U.S. 1089 (2002), which held that "the exigency that exists because of dissipating alcohol does not disappear until a satisfactory, useable chemical test has been taken." *Id.* at ¶40. The Court of Appeals characterized this holding as a "clear directive from the state Supreme Court." *Faust,* 2003 WI App 243, ¶13. (See, Appendix B, pg 42a). Again, the State appealed this decision.

4. The Supreme Court of Wisconsin decision

a. The majority opinion. On July 2, 2004, a divided Supreme Court of Wisconsin issued a published decision reversing the holding of the Court of Appeals for Wisconsin. *State of Wisconsin v. Faust*, 2004 WI 99, 682 N.W.2d 371 (July 2, 2004). The majority opinion didn't agree that the directive in *Krajewski, supra*, was quite as clear as the Court of Appeals had stated. The Supreme Court of Wisconsin held that the presence of one presumptively

valid chemical sample of a defendant's breath does not extinguish the exigent circumstances justifying a warrantless blood draw. *Faust,* 2004 WI 99, at ¶3. (See, Appendix A, pg 2a-3a). Further, the court went on to hold that the nature of the evidence sought (the rapid dissipation of alcohol from the bloodstream), not the existence of other evidence, determines the exigency. *Id.* ¶3 (See, Appendix A, pg 2a-3a).

The majority opinion cited this Court's decision in *Schmerber v. California*, 384 U.S. 757 (1966), for the general principle that a "compelled intrusion into the body for blood to be analyzed for alcohol content constitutes a search under the Fourth Amendment." *Faust*, 2004 WI 99, at ¶10. Appendix A, pg. 7a. The majority continued its reliance on *Schmerber* by observing that:

> ... the United States Supreme Court established that the rapid metabolization and dissipation of alcohol from the bloodstream of an individual arrested for a drunk driving related offense qualifies as an exigent circumstance justifying the attempt to secure evidence of intoxication without first securing a warrant.

Faust, 2004 WI 99, at ¶12, Appendix A, pg 7a-8a, citing *Schmerber* at 770-71. This is the oft quoted language from *Schmerber* establishing that the exigent circumstances exception applies to drunk driving cases. However, the majority opinion cited no other significant United States Supreme Court precedent in its landmark determination that the exigency inquiry is limited only to the nature of the evidence being sought. Thus, the Wisconsin Supreme Court decision stands for the proposition that even when the object of the search is completed and the evidence is successfully seized, the nature of the exigency warrants continued

searches and seizures until the officer decides, on his own, that the exigency has sufficiently dissipated.

The majority made passing reference to *United States v. Reid*, 929 F.2d 990 (4th Cir. 1991), and summarized the holding parenthetically as "upholding multiple breath tests of one defendant under the exigent circumstances doctrine." *Faust*, 2004 WI 99, at footnote 9. Appendix A, p 13a. This is not the holding of *Reid* at all. The issue of whether the exigency dissipates after the submission of one test over the legal limit was not raised or addressed in the *Reid* case. The Fourth Circuit merely concluded that the exigent circumstances exception applied to breath tests, consistent with *Schmerber*'s treatment of blood tests, in general. There was no discussion whatsoever in *Reid* regarding an ongoing exigency after the suspect has voluntarily submitted to a test. Further, both defendants in *Reid* did, in fact, voluntarily submit to the tests in question. Therefore, the *Reid* case is inapplicable since this case involves a warrantless nonconsensual forced blood draw, not a voluntary test. The Wisconsin Supreme Court's reliance on the *Reid* decision is misplaced.

It should also be noted that the Supreme Court of Wisconsin justified the decision with a variety of "what if" scenarios that were either not present in this case, or represent speculation that cannot be logically contained to the extent that the decision provides vague guidance to officers in the field. For example, the decision cites the possibility that "the test may be subject to challenge on grounds that the person's consent to the test was not given freely and voluntarily." *Faust*, 2004 WI 99, at ¶20. Appendix A, pg 11a. However, the court does not explain how such a concern translates into the "emergency" contemplated by *Schmerber*. *See, Schmerber* at 770. Indeed, it does not. Speculation as to future defense challenges is unrelated to exigency and cannot be logically

applied in a uniform manner. To do so would result in an exigency existing in every case.

b. The dissent. Three of the justices in the Wisconsin Supreme Court dissented from the majority opinion, in two dissenting opinions. Chief Justice Abrahamson believed that exigent circumstances did not exist because the arresting officer had already obtained what he believed to be a voluntary and sufficient breath test that demonstrated Faust's alcohol concentration was in excess of the legal limit. *Faust*, 2004 WI at ¶36. Appendix A, pg. 24a. She went on to state that "the crux of the Fourth Amendment is reasonableness" and that the majority opinion "erroneously holds that the nature of the evidence alone determines whether exigency exists." *Faust*, 2004 WI at ¶ 40, 42. Appendix A, pg. 25a-26a.

The Chief Justice justified her rationale by pointing out that evidence of alcohol in the body is destroyed by the passage of time without any act of the individual involved and that "all evidence of intoxication cannot be gathered and preserved." *Faust*, 2004 WI at ¶44. Appendix A, pg 26a-27a. Indeed, it would appear from the majority opinion that the exigent circumstances exception should serve as a means to gather cumulative evidence beyond the bounds of reasonableness. The Chief Justice stated that "evidence of intoxication that is being destroyed in the present case is cumulative of other evidence already collected and preserved." *Faust*, 2004 WI at ¶44. Appendix A, pg. 29a.

This dissenting opinion also criticized the majority for permitting law enforcement to compel the seizure of blood as many times as the officer feels is necessary without setting any limit on the reasonableness of such an ongoing exigency. She stated:

> The majority's argument is essentially that because the law enforcement officers do not know what will happen at trial (an no one does, of course), it was reasonable for them to take as many valid tests of the suspect's blood alcohol as they thought necessary to sustain a conviction.

Faust, 2004 WI at ¶45, Appendix A, pg. 27a. According to Chief Justice Abrahamson, the majority conceded that law enforcement cannot have carte blanche to take an unlimited number of tests as long as alcohol continues to dissipate, but the majority "refuses to define the outer limits of how many tests are reasonable." *Faust*, 2004 WI at ¶48. Appendix A, pg. 28-29a.

Justice Prosser authored his own dissent, arguing that the majority redefines "exigency" to the point that it becomes meaningless. *Faust*, 2004 WI at ¶56. Appendix A, pg. 30a. It is a rare occasion that a supreme court justice pulls out the dictionary to make a point, but it happened in this case because of the elementary flaw in the logic of the majority opinion. Justice Prosser cited the American Heritage Dictionary of the English Language and its definition of "exigent." It means "requiring immediate action or remedy," or a "pressing or urgent situation." *Faust*, 2004 WI at ¶57, Appendix A, pg. 31a, citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 642 (3d ed. 1992). Exigencies are "urgent requirements, pressing needs." *Id.*

Justice Prosser then goes on to do what the majority did not do - he summarized holdings of the United States Supreme Court on the issue of exigency, each of which supported Justice Prosser's conclusion that a second search cannot be justified as an "urgent requirement." Pointing to the case law that preceded *Schmerber*, Justice Prosser cites

McDonald v. United States, 335 U.S. 451 (1948), wherein this Court suppressed evidence obtained when police intruded into the home of a suspected "numbers" operator. In that case, Justice Douglas reflected on the importance of the Fourth Amendment:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some ***grave emergency***, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

Faust, 2004 WI at ¶59. Appendix A, pg. 31a-32a, quoting *McDonald*, 335 U.S. at 455-56, (emphasis added). Justice Prosser then emphasized the language in *Johnson v. United States*, 333 U.S. 10 (1948), wherein this Court stated that exceptional circumstances did not exist in that case because "no evidence or contraband was threatened with

removal or destruction." *Faust*, 2004 WI at ¶ 59, Appendix A, pg. 32a, quoting *Johnson*, 333 U.S. at 14-15. Justice Prosser concludes that the police had obtained satisfactory, usable evidence and that nothing threatened the destruction of that evidence - the only thing "threatened," as Justice Prosser put it, was "the destruction of additional evidence of the same character." *Faust*, 2004 WI at ¶63, Appendix A, pg. 34a. He believed that the exigent circumstances exception as envisioned by this Court's precedent, did not justify the warrantless nonconsensual search of Faust's blood.

REASONS FOR GRANTING THE PETITION

This Court will consider review on certiorari if a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. SUP. CT. RULE 10(b). This Court will also consider review on certiorari if a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with the relevant decisions of this Court. SUP. CT. RULE 10(c). Petitioner asserts that the decision below meets the criteria set forth in both rule 10(b) and rule 10(c), as explained herein.

A. The decision below conflicts with the Ninth Circuit's decision in *Nelson v. City of Irvine*.

1. The *Nelson* case compared to *Faust*. The decision of the Wisconsin Supreme Court is at odds with the United States Court of Appeals for the Ninth Circuit's decision in *Nelson v. City of Irvine,* 143 F.3d 1196 (9th Cir 1998), *cert denied* 525 U.S. 981 (1998). That case held:

> When an arrestee requests but is denied the choice of an available breath or urine test, the exigency used to justify the warrantless blood test continues only because of the City's failure to perform the requested alternative test. Whenever a DUI arrestee consents to a breath or urine test, and such tests are available, the administration of either the breath or urine test would preserve the evidence and end the exigency. In such cases, because the sole justification advanced to excuse the officers from obtaining a warrant disappeared when the exigency ended, the blood tests were not only unnecessary and unreasonable, but violated the Fourth Amendment's warrant requirement.

Id. at 1205. In *Nelson*, the Ninth Circuit dealt with a situation where the suspect was *willing* to submit to a breath test in lieu of a blood test. According to Nelson, the mere indication that a suspect is willing to provide a chemical sample by an authorized means other than blood is sufficient to extinguish the exigency to obtain blood. Here, Faust not only indicated this willingness, but the police actually *obtained* the breath test result - an even stronger argument that the exigency is gone. It is hard to square *Faust* with *Nelson.*

To pass constitutional muster under the Fourth Amendment a search must be reasonable. *Ohio v. Robinette,* 519 U.S. 33, 117 S. Ct. 417, 421, 136 L. Ed. 2d 347 (1996). Generally, a search must also be supported by probable cause, and must be backed up by a warrant, or the circumstances must fit an exception to the warrant requirement. *Winston v. Lee,* 470 U.S. 753, 759-61, 84 L. Ed. 2d 662, 105 S. Ct. 1611 (1985).

In *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966), the Supreme Court held that blood extraction from an arrestee who had refused a breath test is reasonable. However, the Court expressly reserved the question whether the government could take blood when other tests were available or requested:

> Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the "Breathalyzer" test petitioner refused. . . . We need not decide whether such wishes would have to be respected.

Id. at 771. This Court also emphasized in *Schmerber* that its holding "in no way indicates that [the Constitution] permits more substantial intrusions, or intrusions under other conditions." *Id.* at 772. Thus, *Schmerber* did not reach the issue of whether it violates the Fourth Amendment's reasonableness command to require an arrestee, who has expressed a preference for, or consented to, an available breath or urine test, to submit to a blood test. Likewise, *Schmerber* did not reach the issue of whether it violates the Fourth Amendment's reasonableness command to compel a blood test when the police have another form of the same evidence in hand.

In *Winston v. Lee, supra*, this Court held that it violated the Fourth Amendment to forcibly remove a bullet having evidentiary value from the chest of a robbery suspect. The Court clarified and applied the *Schmerber* balancing test as "the appropriate framework of analysis," noting that "the question whether the community's need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers." 470 U.S. at 760.

An interesting component of this scenario which was not present in *Nelson* is that the "evanescent" evidence sought to be seized is actually less relevant than the evidence already obtained. Once a valid sample is taken from the suspect, the exigency of obtaining additional evidence at a point in time further removed from the act of driving (which is the point in time that the crime is committed) becomes less exigent. It is not "the best evidence" if a breath sample has already been taken. It is difficult to see how the exigency remains after one test has already proven the point.

2. In both *Nelson* and *Faust*, blood has the equivalent evidentiary value as breath. As stated in Nelson,

> California law provides that the amount of alcohol in a person's blood may be shown by chemical analysis of that person's blood, breath, or urine, *Cal. Veh. Code § 23155(a)*, and criminalizes "driving either with the specified blood-alcohol level or with the specified breath-alcohol level." *People v. Bransford, 8 Cal. 4th 885, 890, 884 P.2d 70 (1994)*. Thus, in California, breath and urine tests are equally effective as a blood test in determining whether a suspect has violated the DUI law. *People v. Fiscalini, 228 Cal. App. 3d 1639, 279 Cal. Rptr. 682, 686 (Ct. App. 1991)*.

Nelson v. City of Irvine, 143 F.3d at 1201. Much like California, Wisconsin treats the results of breath, blood and urine tests as equivalent forms of chemical evidentiary analysis. According to § 885.235 of the Wisconsin Statutes:

> In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration while operating or driving a motor vehicle ... evidence of the amount of alcohol in the persons blood at the time in question, as shown by chemical analysis of a sample of the persons blood or urine or evidence of the amount of alcohol in the persons breath, is admissible on the issue of whether he or she was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration if the sample was taken within 3 hours after the event to be proved.

WIS STAT 885.235(1g)(2001-02) (Appendix C, pg 50a-51a). Thus, it is clear from the statute that obtaining a blood sample has precisely the same evidentiary effect as obtaining a breath sample. The statutes do not recognize blood as a superior method of analysis over breath - they are treated exactly the same. Thus, the same rationale applied in *Nelson* should logically apply in this case.

B. The decision below represents an important federal question that has not been, but should be, settled by this court.

The Faust decision represents a watershed that has the potential to extend the exigent circumstances exception far beyond that originally contemplated by *Schmerber*. Police officers, following the logic of *Faust*, will have unfettered discretion to conduct an infinite number of searches based upon the mere assertion that they believe the nature of the evidence sought constitutes an exigency. There is now no rule in Wisconsin that sets any limit of

reasonableness on such searches. The *Faust* decision does not draw any distinction between two tests of the defendant's alcohol concentration versus twenty. Even in the case of an individual who consents to additional tests, there is the risk of police abusing a procedure when at some point, it is logical to assume that a suspect will have "had enough" and will stop consenting to repeated blood draws, thereby bringing about a refusal charge in addition to the drunk driving charge.

Chief Justice Abrahamson put it best in her dissenting opinion in *Faust*:

> By failing to define the outer limits of what is reasonable in a blood draw case, the majority opinion opens the door to more litigation. The majority opinion also leaves law enforcement officers, litigants, circuit courts, and the court of appeals in a quandary, without guidance regarding what number of tests is reasonable.

Faust, 2004 WI at ¶50, Appendix A, pg. 29a. Justice Prosser set forth additional factors which illustrate the importance of this case:

> ... it would seem as though an exigency exists in every case in which blood is not drawn. Such an exigency is a built in rationale for extended detention and additional tests potentially amounting to harassment.

Faust, 2004 WI at ¶65, Appendix A, pg. 35a.

This Court has not decided a drunk driving case implicating exigent circumstances since *Schmerber*. The

country is in need of definitive and uniform guidance on this issue which can only be provided by this Court.

C. The decision below conflicts with the relevant decisions of this court.

The decision below has expanded the exigent circumstances exception beyond the limits defined by this Court. The holding announced in *Schmerber* is not boundless. This Court has consistently viewed the exigent circumstances exception in such a way as to require a showing of imminency or emergency on a case-applied basis. In Wisconsin, we now have a rule under *Faust* which categorically regards all searches of blood as exigencies. This Court has never issued a holding as broad in application as the *Faust* case suggests the Fourth Amendment permits. This Court has carefully applied the exception to specific facts.

For example, in *Cupp v. Murphy*, 412 U.S. 291 (1973), the Court found that exigent circumstances justified the warrantless search of fingernails for skin, blood cells, and fabric because police feared the destruction of evidence in that case. The suspect had a motive and the ability to destroy the evidence and under the specific facts presented to the Court, the exigency was justified. However, the holding did not result in a rule that gives carte blanche to law enforcement to treat all fingernail searches as exigent by the *nature* of the evidence.

Likewise, the Court found exigent circumstances in *Warden v. Hayden*, 387 U.S. 294 (1967), where police made a warrantless entry into a home for an armed robbery suspect because any delay would endanger the lives of officers and citizens. As duly pointed out by the majority in *Faust*, drunk driving is a serious problem in our country. However, it cannot be said that public safety is any more at risk by

adhering to the reasonableness standard when a satisfactory, valid sample is already in the possession of the police. Seizing an additional, cumulative test does no more to protect the safety of citizens than the voluntary test did. He was arrested for drunk driving and remained in police custody whether he consented to the test or not.

In *Ker v. California*, 374 U.S. 23 (1963), the Court found that exigent circumstances justified the warrantless search of an apartment for drugs, but only because the police feared the imminent destruction of the drugs. Again, the Court did not render a decision which treats all drug cases categorically as exigent circumstances cases. The holding was specific to the facts of the case. In *United States v. Santana*, 427 US 38 (1976), the Court found that a warrantless search was justified because the suspect was chased from the doorway of a home into the vestibule. Again, the police had to act quickly to seize the evidence they felt was literally running away from them.

Significantly, the Court found in *Welsh v. Wisconsin*, 466 US 740 (1984), that exigent circumstances did not justify a warrantless entry into a suspects home on suspicion of a drunk driving offense. If the rationale in *Faust* is the correct one, this Court could easily have found that exigent circumstances existed to obtain blood from Mr. Welsh simply because he had blood in his body and any alcohol present in the blood was dissipating. Although the issue in Welsh dealt with entry into a private home, it would appear that if the Court had wanted to extend *Schmerber* to treat all drunk driving case as exigency cases, it could have done so.

The *Faust* decision is incongruous with precedent of this Court. This most recent step in the evolution of Wisconsin's view of the Fourth Amendment has strayed far away from the original course laid out by *Schmerber*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 30, 2004